Challenges and Pitfalls in Revising the Canadian Copyright Act*

Marcel Boyer**

Abstract

The House of Commons Standing Committee on Industry, Science and Technology and the Standing Committee on Canadian Heritage filed their *Copyright Act* review reports in 2019. Among their recommendations: the term extension of copyright, the new "termination right," the amended copyright reversion regime, and the new mandatory registration system. I provide an economic policy analysis of the implications of those recommendations on creator bargaining power and remuneration, on the availability of works, and on the creative marketplace in general. I conclude that the committees' intended goals will not be fully achieved if their recommendations are implemented as formulated.

Résumé

En 2019, deux comités permanents de la Chambre des communes, notamment le Comité de l'industrie, des sciences et de la technologie et le Comité du patrimoine canadien, ont déposé

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** © 2021 Marcel Boyer, PhD, OC, CQ, FRSC, Emeritus Professor of Economics, Université de Montréal; Bell Canada Professor of Industrial Economics (2002–2008), Université de Montréal; Jarislowsky-SSHRC-NSERC Professor of International Competition (1992–2000), École Polytechnique de Montréal; associate member, TSE and IAST; fellow, CIRANO and CD Howe Institute. I am grateful to the numerous economists and lawyers from academia, copyright collectives, law firms, private and public organizations and corporations, and judges on copyright boards, in Canada and abroad, representing all sides of cases and debates, sometimes highly charged, for their generous comments, lessons, examinations, and cross-examinations, which have helped to forge my understanding of copyright issues over the last decades. They are too numerous to list here. I remain solely responsible for the content of this article.

leurs rapports de révision de la *Loi sur le droit d'auteur* dans lesquels ils formulent certaines recommandations, dont la prolongation de la durée de protection du droit d'auteur, le nouveau « droit de résiliation », le régime amendé de réversion du droit d'auteur et le nouveau système d'enregistrement obligatoire. Je présente dans cet article une analyse politique et économique des répercussions de ces recommandations sur le pouvoir de négociation et la rémunération du créateur ainsi que sur la disponibilité des œuvres et le marché de la créativité en général. J'arrive à la conclusion que les objectifs visés par les comités ne seront pas complètement réalisés si leurs recommandations sont mises en œuvre telles que formulées.

1.0 Introduction

In June 2012, the House of Commons adopted Bill C-11, known as the *Copyright Modernization Act*. Among the provisions was new section 92, mandating a review of the *Copyright Act*[1] every five years.

On December 14, 2017, the Minister of Innovation, Science and Economic Development Canada and the Minister of Canadian Heritage announced plans to commence a parliamentary review of the *Copyright Act.* The Canadian House of Commons Standing Committee on Industry, Science and Technology ("the Industry committee") was entrusted with the parliamentary review. It received 192 written briefs and heard testimony from 263 witnesses.[2] On June 3, 2019, its report

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[1] RSC 1985, c C-42.

[2] Submissions were received from a wide variety of stakeholders, including individuals; student associations, universities, libraries, and researchers; unions, associations, and collective management organizations representing creators and performers; corporations from the communications sector; associations representing the film, theatre, and music industries; media organizations; government departments; and representatives of the Copyright Board of Canada.

on the statutory review of the *Copyright Act* was released.[3] The report included 36 recommendations and discussed, among other things, term extension, the reversion right, and a termination right. The Canadian House of Commons Standing Committee on Canadian Heritage ("the Heritage committee") was asked, as part of the parliamentary review, to conduct a parallel consultation. On April 10, 2018, it announced the launch of a study on remuneration models for artists and creative industries in the context of copyright. It received 75 briefs and heard testimony from 115 witnesses. On May 15, 2019, its report was released.[4] The report included 22 recommendations and discussed, among other things, term extension and the reversion right.[5]

In Canada, the term of copyright lasts from the time of creation until the end of the calendar year that is 50 years after the death of the creator.[6] The duration of the general term of copyright in Canada is shorter than in most of its main economic partners.[7] And section 14 of the *Copyright Act* returns copyright to an author's heirs 25 years after his or her death, deeming void the terms

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[3] House of Commons, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (June 2019) (Chair: Dan Ruimy), online: <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> ["Industry committee report"].

[4] House of Commons, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage* (May 2019) (Chair: Julie Dabrusin), online: <https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf> ["Heritage committee report"].

[5] An additional 30-day consultation was launched by Heritage Canada and ISED (the Department of Innovation, Science and Economic Development) in February 2021, but it did not yield any new ideas.

[6] In the case of a published sound recording or performer's performance, copyright subsists for 70 years from the end of the calendar year in which the first publication occurs (or 100 years from the date of the first fixation of the performer's performance or sound recording, if earlier).

[7] See the Industry committee report, *supra* note 3 at 33, figure 1.

of any contract assigning copyright or granting an interest in the author's copyrighted works. Section 14 thereby provides the author's heirs with the opportunity to reassess the value of the deceased author's copyrights and to strike a new contract if the observed value justifies a renegotiation of contract terms.

My objective in this article is to provide a critical economic review of the arguments underlying four recommendations made by the committees: (1) the extension of the term of copyright, from the life of the author plus 50 years to the life of the author plus 70 years, conditional on the ratification of the Canada–United States–Mexico Agreement (CUSMA); (2) the introduction of a so-called termination right, that is, a "non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer"; (3) an amendment to the copyright reversion regime, to make it effective 25 years after the execution of the transfer rather than 25 years after the death of the author; and (4) the introduction of registration as a mandatory prerequisite for the enforcement of the exclusive rights of a copyright owner during the 20-year extension term, as well as for the exercise of the reversion right and the proposed termination right.

The observations and recommendations of both committees demonstrate some serious misunderstandings and analytical gaps. These shortcomings raise questions of whether the proposed changes improve the processes that govern the production and dissemination of copyright-protected works, and what impact the changes will have on creator bargaining power and remuneration, the availability of works, and the creative marketplace in general.

Modifying the reversion right and introducing both a termination right and compulsory registration may result in an increase in uncertainty and royalty risks, thereby depressing the

discounted value of royalties, and I challenge the committees' assumptions about the incentive effects of economic discounting.

I discuss other common misconceptions about term extension, reversion rights, and termination rights, most notably that term extension prevents the growth of the public domain and that weaker reversion or termination rights lead to reduced availability of works. I conclude that term extension favours an increase in future royalties and is fully compatible with economic efficiency principles. I also conclude that the increased uncertainty arising from a redefined reversion right and the introduction of a new termination right and compulsory registration is likely to reduce the size of the royalty pie and hurt the creators they were intended to help.

In my economic analysis, I insist on considering the copyright world as a complex ecosystem with intertwined incentives, and I caution against creating artificial conflicts between creators and creative businesses, who are in a joint endeavour to maximize the value of creations. I also insist on the distinction between "the size of the pie" (future expected royalties discounted at a risk-adjusted rate) and "the sharing of the pie" between creators and other stakeholders including creative businesses. I argue that the committees concentrated their efforts on factors that may affect the *sharing* of the pie. In so doing, the committees' recommendations may result in creators capturing a larger share of a smaller pie, leading to overall lower compensation for creators. If the committees' goal was to increase the compensation of creators of copyrighted works, they should have invested more effort on factors that affect the *size* of the pie.

2.0 The Industry, Science and Technology Report

In this section I summarize the Industry committee's observations and recommendations regarding term extension, the reversion right, and a termination right.[8]

Several witnesses supported extending the term of copyright, arguing that doing so would increase opportunities to monetize copyrighted content, and thus increase the value of copyright holdings and encourage investments in the creation, acquisition, and commercialization of existing and future copyrighted content, while also harmonizing the *Copyright Act* with the copyright legislation of Canada's major trading partners, as well as benefiting a deceased author's descendants (provided that they hold copyright).

Several other witnesses opposed extending the term of copyright, arguing that doing so would worsen the problem of orphan works and make it hard to access, build on, disseminate, and preserve works; that the current term of copyright already provides enough time for rights holders to profit from copyrighted content; and that term extension would enrich intermediaries and not creators. Some witnesses suggested that mitigation efforts, such as subjecting copyright protection for an extra 20 years of formalities such as registration, would comply with international obligations, promote copyright registration, and help lessen the orphan work problem.

The Industry committee observed that if the current version of CUSMA is ratified, Parliament would need to make the *Copyright Act* compliant with the new agreement by extending copyright from 50 years to 70 years after the death of the author of a work. The committee

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[8] See the Industry committee report, *ibid* at 32–39, for a fuller review of the evidence that the committee considered and its observations.

favoured extending the term of copyright, but only if CUSMA is ratified. It stated that it expected that rights holders will benefit from term extension, but also noted the arguments made against it. The committee believed that requiring rights holders to register their copyright in order to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the perceived disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system.

The Industry committee therefore recommended: "That, in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work."[9]

Some witnesses proposed eliminating the reversion mechanism in the *Copyright Act* because it significantly increases the uncertainty of copyright transfers with little benefit to creators and their descendants, and may instead hinder the commercial exploitation of the copyrighted content. Other witnesses argued that American copyright legislation provides a termination right to the benefit of creators and that there is quite a lot of investment taking place in that sector. The Industry committee noted that many witnesses in favour of term extension said virtually nothing against the reversion mechanism, suggesting that the actual impact of reversion on business practices remains limited.

The Industry committee observed that many witnesses supported term extension to increase the revenues of the descendants of the author and that, as a result, it would be counterproductive to

[9] *Ibid* at 38, recommendation 6.

repeal section 14 of the *Copyright Act*. It stated that the provision could be amended to increase the predictability of the reversion mechanism.

The Industry committee therefore recommended: "That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion."[10]

A termination right was proposed to "ensure that more of the benefits from copyright extension flow to creators," as well as to address the "bargaining imbalance" between creators and other members of creative industries.[11] It was argued that these proposals would, among other things, grant creators the opportunity to resell their copyright with better knowledge of its market value 25 years after its assignment. Others argued that termination rights were not necessary because the *Copyright Act* can already accommodate such an arrangement in the assignment contract, and that the preferred solution would be to introduce amendments that would increase the revenues of all rights holders, who can then determine how to share such revenues.

The Industry committee observed that creators already "receive little remuneration for their work," that the effective lifespan of most copyrighted content tends to be short, and that the American experience does not suggest that the termination right deters investment. It concluded: "If copyrighted content is still commercially profitable 25 years after being created, its creator

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[10] *Ibid*, recommendation 7.

[11] *Ibid* at 36.

should have the opportunity to increase the revenues they draw from it. The Government, should, however, take measures to make the exercise of the termination right predictable."[12]

The Industry committee therefore recommended: "That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration."[13]

3.0 The Canadian Heritage Report

In this section I summarize the Heritage committee's observations and recommendations regarding term extension and the reversion right.[14] The committee did not discuss a termination right.

Witnesses proposed to extend the term of copyright protection to align with Canada's main international partners. The committee acknowledged that CUSMA, though it had not completed the legislative process toward ratification and implementation, requires Canada to modify its intellectual property framework to extend copyright protection to "life plus 70 years."

Witnesses argued, among other things, that the length of the copyright term was meant to protect creators for two generations; that term extension would mean additional investment "in the

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[12] *Ibid* at 38–39.

[13] *Ibid* at 39, recommendation 8.

[14] See the Heritage committee report, *supra* note 4 at 21–22 and 30–31, for a fuller review of the evidence that the committee heard.

career development of Canadian songwriters and composers"; that it would give creators "the ability to leverage their success"; and that aligning Canada's copyright term with its major trading partners would ensure "robust compensation" to creators and their families.[15]

No witnesses expressed outright opposition to term extension, but one witness brought forward the "nuanced approach" that there is "no incentive up front to artists to extend term to 70 years after death," that there is more value in rights reversion, and that "reversion and ownership of rights do not exclude actual term extension."[16]

The Heritage committee recommended: "That the Government of Canada pursue its commitment to implement the extension of copyright from 50 to 70 years after the author's death."[17]

Witnesses recommended a modification to the rights of reversion provision, replacing the words "death of the author" in section 14(1) of the *Copyright Act* with the word "assignment." Witnesses argued that doing this would "limit the unfairness" that comes from the unequal bargaining position of creators vis-à-vis producers, and that "rights reversion" would offer a real incentive to creators compared to term extension by giving creators an opportunity to obtain greater benefit from works that may continue to have a market.[18]

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[15] *Ibid* at 21–22.

[16] *Ibid* at 22.

[17] *Ibid* at 22, recommendation 7. Unlike the Industry committee, the Heritage committee did not propose any registration requirement tied to the extension of term.

[18] *Ibid* at 31.

The Heritage committee recommended:[19] "That the Government of Canada amend subsection 14(1) of the *Copyright Act* so that it reads 'from 25 years after assignment.'"

4.0 The Economics of Copyright

The objectives underlying the Industry and Heritage committees' recommendations appear to be twofold: (1) to address the so-called imbalance in creators' bargaining power to help creators secure additional compensation; and (2) to mitigate the effects of, or to increase predictability in relation to, term extension, reversion, and termination, by introducing a registration requirement.

It is extremely difficult to assess the so-called economic impact of different changes in copyright laws on different groups of stakeholders. The efficiency conditions of the production and dissemination of copyright-protected works are more complex than those for ordinary goods.

Rather than attempt to quantify the impact of term extension, reversion rights, or termination rights on these different groups, I take a more meaningful approach to consider whether the proposed amendments favour or improve the processes that govern the production and dissemination of copyright-protected works. If they do, it would suggest that the amendments are warranted. If they do not, it would suggest that the amendments should be reconsidered or dropped altogether. For reasons discussed below, I conclude that the proposed amendments are unlikely to encourage the production and dissemination of copyright-protected works, and may actually discourage them.

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[19] *Ibid*, recommendation 14. Unlike the Industry committee, the Heritage committee did not propose any notification requirement or other prerequisite to the exercise of the reversion of copyright.

Before engaging in that analysis, I discuss how some of the committees' observations and recommendations seem to overlook or misunderstand certain key underpinnings of the copyright ecosystem. I posit that, had those considerations been properly understood, they may have led to different observations and recommendations.[20] I then consider whether the proposed amendments favour or improve the processes that govern the production and dissemination of copyright-protected works.

The economics of copyright do not involve a simple application of basic or elementary economic principles. Instead, they engage rather advanced concepts and analysis in economic theory, because copyrighted works are generally *information goods*.[21] An information good is a product or service whose value arises from the information it contains. Once produced, at a relatively large fixed cost, the good can be reproduced and consumed by all at a low, even zero, marginal cost. Books, musical works, and sound recordings are all examples of information goods, or "non-rival goods": once created, they can be consumed by everyone. In contrast, a "rival good"—a tomato, for example—can be consumed only once; once consumed, that same tomato cannot be consumed by anyone else.

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[20] Of course, the Industry and Heritage committees cannot be faulted entirely. Their recommendations were based on evidence presented by various stakeholders that was not grounded in economic theory or, in some cases, that missed the full reality of the copyright ecosystem in which negotiations and bargains take place.

[21] To simplify the discussion, I use the term "information goods" to refer to both "information goods" and "information assets." While the concepts are otherwise similar, they are distinguishable on the basis of durability. An information good is typically available for a short period or only at the time it is produced, while an information asset is available for an indefinite period. Once created, an information asset can be consumed by everyone now and/or in the future. Accordingly, while copyrighted works may be more accurately referred to as "information assets," I use the term "information goods" for simplicity and consistency.

A rival good can be valued by obtaining an estimate of the marginal cost and the marginal willingness of consumers to pay. The same analysis can be applied to information goods, but with an added challenge: Which marginal cost should be used? The marginal cost of reproducing an information good (low), or the marginal cost of creating an information good (high)?

The first-best social efficiency rule calls for selling the good at its marginal reproduction cost and covering the deficit through, for example, a government subsidy. However, this would likely be unrealistic when the marginal cost of dissemination is very small and when political cronyism and other bureaucratic imperfections are taken into account. Economists have proposed a different rule, called the second-best social efficiency rule. The idea is to set the price of copyrighted works above their marginal reproduction cost in such a way that pricing generates enough revenues to properly compensate creators while ensuring the largest and widest possible dissemination. This rule generates some deadweight loss, because the price is set above the marginal cost of reproduction, but it avoids relying on bureaucracy or a potentially fickle political calculus. This is where our attention should be focused.

The balancing act here is to provide proper incentives for creators and innovators while at the same time fostering the dissemination of creations and innovations: proper incentives and proper dissemination rest fundamentally on the competitive market evaluations of value, costs, and benefits. To make that assessment, an evidence-based research program into the three essential facets of compensation would be required: determining the size of the pie, the contributors or payers into the pie, and how that pie should be shared among rights holders.

The committees' observations and recommendations demonstrate that at least four basic relevant concepts have been misunderstood or overlooked.

First, contracts under the current *Copyright Act* can already accommodate the types of "arrangements" the committees recommended. The amendments proposed are unlikely to deliver any real benefit to creators if imposed on them and their creative business partners. By superficially micromanaging the relationships between creators and creative businesses through legislative amendments, the changes are likely to end up doing more harm than good to creators and reduce their overall compensation, as I discuss in more detail below.

The committees did not appear to appreciate that any change in the way copyright will be managed in the future will have impacts today: restrictions on term extension, amendments to the reversion right, and the introduction of a termination right reduce the value of copyrighted works for creative businesses (producers, record labels, publishers, distributors, and others) and therefore the value of payments to creators, upfront now or over time.[22]

To illustrate this point, copyright industries can be viewed as forming a microcosm or an ecosystem that consists in a complex set of nodes/neurons (with creators and creative businesses at the forefront) and their interconnections (relations and contracts). Creators and creative businesses are involved in a joint endeavour to maximize the value of creations, including the development and promotion of artistic talent. It is important not to create an artificial conflict between creators and creative businesses, partners in the development and promotion of creations. In a real sense, creators and creative businesses are in the same boat.

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[22] In contrast, increasing the period during which they will be able to exploit the works and reducing the uncertainty of ownership itself will necessarily induce creative support companies, assignees, and licensees to increase the discounted expected value of a copyright transfer and therefore increase the competitive amount they will pay upfront now or later to a creator.

Second, although the committees heard from many stakeholders that, in general, creators receive (too) little remuneration for their work, any suggested correction to the underlying factors must take into account the determinants of market value of creations, the mathematics of discounting the future, and the presence of uncertainty.

The committees' recommendations deal exclusively with regulating the downstream game of sharing royalties between creators and other stakeholders, particularly creative businesses, without modifying the upstream game of the way royalties for copyrights are determined and the amount of royalties paid by users "at large." This is equivalent to pursuing the wrong objective, losing sight of the forest for the trees. Not addressing the upstream game at the same time as the downstream game will ultimately mean that creators lose instead of gain compensation.

The committees fail to recognize that the incentive for creators to create innovative, high-quality works, on the one hand, and the incentive for creative businesses to maintain the availability of works, develop and promote their market value, and protect them from decaying and falling into oblivion, on the other hand, are inextricably intertwined.[23] The committees should have proposed amendments to the *Copyright Act* that could and would increase "the size of the pie" by raising the revenues of all rights holders and their partners toward their competitive levels. Instead, they engaged in "the sharing of the pie," taking from creative businesses to try to give more to creators, which ultimately reduces the size of the pie.

[23] Indeed, investments in songwriter development as well as more generally talent development across the copyright industries are a major factor in the success of creators, and these investments rest in good part on copyright revenues allocated to creation support companies. For example, see Lisa Freeman, *Export Ready, Export Critical: Music Publishing in Canada* (Toronto: Canadian Music Publishers Association, 2017) appendix A (with Benoît Gauthier, Circum Network).

Third, to introduce a series of impediments to the smooth unravelling of copyright term extension, including mandatory registration or a new termination right, risks making the updated *Copyright Act* even more cumbersome and opaque than the current one, with significant new transaction costs and few if any corresponding benefits.

Fourth, in Canada, there is an explicit recognition that creators' rights and users' rights are on an equal footing. The competitive pricing of copyrights in such a context aims to achieve both balance and neutrality between creators' rights and users' rights. Achieving such pricing and equilibrium requires a move away from traditional heuristics toward sounder analytics. Unfortunately, the committees did not venture in any serious way into those difficult issues.

5.0 A Critical Review of Term Extension

Many of Canada's global trading partners have already implemented term extension.

In 1995, the European Union extended the term of copyright for its member states from the life of the author plus 50 years ("life+50") to the life of the author plus 70 years ("life+70"). The change was a consequence of a directive of the European Commission in 1993, which required member states to increase their basic term of protection. Ostensibly, the purpose of the directive was to harmonize the laws of European Union members, because national laws at the time ranged from life+50 to life+70. Consistent with the *Berne Convention*,[24] the European Union permitted its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term.

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[24] World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works* (as amended 28 September 1979), online: <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698#P127_22000>.

In the United States, the term extension of copyright from life+50 to life+70 was enacted following the US *Copyright Term Extension Act* of 1998 (CTEA), also known as the *Sonny Bono Copyright Term Extension Act*. The CTEA was the object of a lengthy court battle, culminating in the 2003 decision of the US Supreme Court in *Eldred v Ashcroft*.[25] In that case, an electronic publisher, Eric Eldred, was concerned that the 20-year extension in the copyright term would prevent him from publishing books that had been previously in the public domain.

The Industry and Heritage committee reports refer to arguments similar to the ones raised in the *Eldred* case, which have been put forward by different stakeholders.

Let us insist at the outset that copyright term extension does not represent an absolute barrier to publication or use of creative works, but rather sets the conditions for a proper price-setting mechanism to emerge, by levelling the playing field between creators and users.

Having access to past copyrighted material in the creation process of current creators is not much different from having access to office space, equipment, plumbers, electricians, managing consultants, artistic consultants, and so on. All of those resources or factors help creators produce new quality works. The fact that creators must pay for those factors necessarily limits their capacity to produce more works. But nobody claims that creators should not be asked to pay their rent or electricity simply because they are creators. The royalties to be paid for the use of copyrighted works from the past is no different.

Furthermore, all those payments for factors in the creative processes are nothing to worry about, insofar as such payments, including royalties, are set or determined by competitive forces.

[25] 537 US 186 (2003), online: <https://supreme.justia.com/cases/federal/us/537/186/>.

Clearly, there are numerous copyrighted works from the past that are competing with each other in such an intense way that royalties can be considered competitive.

Most stakeholders recognize the benefits of copyright law in terms of inducing creation, allowing the maintenance, promotion, and marketing of copyrighted works, and more generally favouring the advancement of arts, culture, and science. Most stakeholders also recognize the impediments that adding 20 years of copyright protection may create for artistic and cultural development as well as for scientific activities, in particular for teaching and research. But again, that is not very different from impediments created by the necessity to use other costly factors, goods, and services in the creation of new works as well as in teaching and research.

Opponents of term extension argue that it adds little if any incentive for creation. They argue that, although term extensions may favour maintenance and marketing of works by copyright owners (some individuals, but mainly organizations and creative businesses), such maintenance and marketing could be better achieved at lower costs, especially by reducing the cost of identifying and finding the copyright owner(s) in many cases, by letting the works in question fall into the public domain, and letting artistic and cultural associations as well as public library archivists take care of them. They maintain that the beneficiaries of term extension are therefore not the creators themselves but rather corporations and creative businesses.

The fallacy in this argument is that it overlooks that creative businesses obtain copyrights from the creators through a willing buyer–willing seller relationship. Therefore, the fact that copyrights are protected (even if the copyright owner is a creative business) allows individual creators to receive better compensation for their works. It is the very foundation of the institution of copyright itself. It is similar for patents and to a lesser degree trademarks: when corporations are protected against the improper use of their patents or trademarks, the ultimate benefactors are

their employees and other stakeholders as well as the general public. Artists and inventors generally seek competent businesses to market and promote their works. Moreover, copyright allows creative businesses to support the development of new works by contemporary artists.

Opponents of term extension portray it as a victory for corporate control of cultural heritage through the inhibition of dissemination of cultural works through new technologies, sometimes framed as an economic policy of intellectual property, that is, "a conceptual map of issues, a rough working model of costs and benefits."[26] But again, these arguments are aimed at the wrong target, namely, the pursuit of the availability and use of works not for free but free from royalties, rather than the more reasonable objective of maximizing availability and use and favouring the creation of new works by contemporary creators, under the constraint of proper compensation for rights holders.

For most stakeholders, the benefits of an "early public domain" arrangement are minimal, if they exist at all. Experience suggests that the key beneficiaries of expired copyrights are businesses that seek to profit from distributing public domain works. However, they do so at a cost that is only somewhat lower than what those works would command if still protected by copyright.[27] It is not apparent that there are any real benefits to the public at large. What is perfectly clear, however, is that creators receive no compensation from the repackaging and distribution of

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[26] For example, see Matthew Rimmer, "The Dead Poets Society: The Copyright Term and the Public Domain" (2 June 2003) 8:6 *First Monday*, online: <https://firstmonday.org/ojs/index.php/fm/article/download/1059/979>.

[27] For example, see *Stargrove Entertainment Inc v Universal Music Publishing Group Canada et al*, 2015 CACT 26, in which an upstart record label sought leave to commence an action under the *Competition Act* against various record labels, music publishers, and collective societies for allegedly conspiring not to grant mechanical licences for the reproduction of musical works on bargain-basement compilation CDs consisting of popular sound recordings that had recently fallen into the public domain.

public domain works. And even if it is true that such additional compensation would add little incentive for the creators of the works, it does not mean that it is irrelevant.

If there is a reason for governments or associations (collectives) to put copyrighted works in the public domain at life+50, nothing prevents them from buying copyrights at their competitive market values at life+50, possibly at very small but occasionally still significant cost, and then putting the related copyrighted works in the public domain or assuming copyright as rights holders while marketing them at zero royalty cost.

Why should creators, their heirs, or the creative businesses whose investment made the copyrighted works possible be the ones financing the public domain? Nevertheless, there will be a time when copyrighted works will fall in the public domain, that is, a time when the costs of the public domain will fall below its benefits. The conclusion from all the reasons and discussions above is that a term of life+50, at the expense of creators, need not be that time.

In the present case, numerous actions can be taken regarding existing works in reaction to a term extension to the benefit of creators, creative businesses, and the general public. New possibilities for the exploitation of existing works open up. Additional commercial value may be seized. Hence, the claim that term extension will simply leave Canadians with 20 additional years of no new works entering the public domain is misleading. While it may be true as a matter of simple arithmetic, this is a short-term phenomenon. Because copyright term extension creates an incentive for creators to create more and better new works, as well as an incentive for copyright owners to better maintain and market existing works, the quantity and quality of copyrighted works that fall in the public domain will eventually increase.

Moreover, if the sole policy objective were to develop and promote the public domain, it would follow that the *Copyright Act* should be amended to reduce significantly the term of copyright

from life+50 to, say, life+25. However, that clearly would not be in the best interests of creators or the general public, for all the reasons provided above.

The fable of a dwarf on the shoulder of a giant who is able to see farther than the giant is often cited to justify the use, free of royalties, of older works by current creators and other groups. John of Salisbury wrote in 1159: "Bernard of Chartres used to compare us to dwarfs perched on the shoulders of giants. He pointed out that we see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature."[28] In light of this, it is important to reaffirm that copyright term extension does not prevent the publication of works or their commercial exploitation under different forms. All it does is to favour the emergence of proper market-like mechanisms under which the creators of the works themselves, as essential input providers, are properly and competitively compensated, alongside the owners of public domain businesses, the investors in those businesses, and the suppliers of offices, technology, and other labour and materials necessary to commercially exploit the works.

What is at issue is the fine balance in copyright between the relative virtues of rights and remuneration, on the one hand, and of the public interest in wide dissemination, on the other hand. As suggested before, copyright law should strive to avoid creating artificial conflicts—here, between creators and the general public—hence the objective of a second-best efficient solution: maximizing the availability and use of copyrighted works under the constraint of a fair and equitable (that is, competitive) compensation of creators. Therefore, it is misleading from an

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[28] John of Salisbury, *The Metalogicon: A Twelfth-Century Defense of the Verbal and Logical Arts of the Trivium*, translated by DD McGarry (Berkeley and Los Angeles: University of California Press, 1955) book III at 167.

economic perspective to view the postponing of the expiration of copyrights by 20 years as inevitably harming the public interest. At most, to repeat the statement above, it simply sets the stage for a price-setting mechanism to emerge in relation to the use of older works during that 20-year period.

An increase in the copyright term may be justified by the fact that life expectancy has increased significantly over the last century or so. If it was reasonable to have a 50-year post-mortem term in the past, when life expectancy was shorter than it is today, it may be justifiable to have a longer copyright term as life expectancy has increased:[29] "The term of protection currently afforded by our *Copyright Act* is out of step with the goals of the *Berne Convention*: it is insufficient to cover two generations of descendants of a songwriter."[30]

More importantly, the incentives to *maintain* the availability of the valuable copyrighted works and to protect them from decaying is a dynamic incentive that may be considered relatively constant over time and little affected by discounting. Hence, extending the term of protection may provide a significant incentive for copyright owners to maintain over time the availability and quality of the copyrighted works produced in the distant past.

Although copyright term extension may represent additional costs (payments for copyrights) for users, publishers, archivists, and the general public, it seems that, on balance, considering the

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[29] Canada joined the *Berne Convention* in 1928, which coincided with the adoption of the life+50 requirement. At that time, the average life expectancy for Canadians was about 60 years. By 2009, it had risen to about 81 years.

[30] Canadian Music Publishers Association and Canadian Musical Reproduction Rights Agency, *Recommendations for Reform of the Copyright Act, RSC, 1985, c C-42: Submission on Copyright Act Reform* (Toronto: CMPA and CMRRA, June 2018) at 3–4, online: <http://www.cmrra.ca/wp-content/uploads/2018/06/CMRRA-CMPA_Copyright_Reform_Consolidated_Submission_June2018.pdf>.

fair-dealing provisions and other exceptions from copyright infringement, all such stakeholders benefit from a better maintained stock of available works.

Opponents of term extension claim that the main economic benefit of copyright protection is to give an author an incentive to create new works, and that the importance of this economic incentive depends upon the present discounted value of future expected compensation as perceived by the creator at the time of creation. They argue that although term extension for *new* works may provide some anticipated gains/compensation for an author, the additional compensation occurring many years in the future has a relatively small present value, and hence provides a very small and even insignificant incentive for an economically minded author of a new work.[31]

It is true that discounting makes values far away in time seem quite low from today's viewpoint, that is, in present-value terms. However, we do not confiscate wealth after *N* years (say, 50 years after the death of the entrepreneur who creates it) simply because the incentive of the entrepreneur to exert significant effort and wisdom leading to the creation of that wealth would not be significantly affected by what would happen such a long time in the future. A similar case could be argued for serendipitous discoveries and creations.

In *Eldred*, Justice Ginsburg stated that creators "expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create," and

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[31] For example, consider a royalty payment of $1 per year. Over a life+30 term of copyright, the present value of that annual copyright payment with a 10 percent risk-adjusted discount rate (a reasonable rate given the systematic risk involved) amounts, *at the time of the creator's death*, to $9.43. Adding an additional year of protection, for a term of life+31, raises the value to $9.48 (+0.5 percent). Adding 10 years, for a term of life+40, raises the value to $9.78 (+3.7 percent). Adding 20 years, for a term of life+50, raises the value to $9.91 (+5.1 percent). Adding 40 years, for a term of life+70, raises the value to $9.99 (+5.9 percent) *at the time of the creator's death*.

cited Senator Dianne Feinstein saying in Congress that creators "take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity."[32] Clearly, the role and importance of heirs is not to be neglected. The desire to leave one's children and grandchildren the possibility of benefiting from one's posthumous popularity is an important source of motivation and runs against and transcends the simple discounting of the future.

In a 2005 article, Liebowitz and Margolis pinpointed a number of serious imperfections in the discounting argument: "A more complete view requires consideration of the responsiveness of creative efforts to marginal incentives."[33] They raised the possibility that small increases in payment need not have small impacts on the creation of additional works. For some creators, in some range of income and with a propensity to create, a small increase in the present value of royalties could make an important difference in creative output, perhaps because they reach a point where they switch to full-time creating. And the converse is possible too: a small decrease in the present value of royalties could make an important difference in creative output, perhaps because they reach a point where they switch to part-time creating activity or even quit.

If this is the case, small increases in payments arising from copyright term extension might result in large increases in the number and quality of creative works produced, which in turn might

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[32] *Eldred v Ashcroft*, *supra* note 25 at 207.

[33] Stan Liebowitz & Stephen Margolis, "Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects" (2005) 18:2 Harv JL & Tech 435 at 457. The article was published after the US Supreme Court had ruled in *Eldred* against the petitioners (and the 17 economists' *amicus curiae* brief) by upholding the CTEA. See also Scott Martin, "The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection" (2002) 36 Loy LA L Rev 253, online: <http://digitalcommons.lmu.edu/llr/vol36/iss1/7>.

produce significant social benefits. Small changes in incentives may have important impacts. This is a case of a significant elasticity at the interval of interest along the supply curve.

Opponents of term extension claim also that term extension for *existing* works makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation is granted after the relevant investment has already been made.

It is clear that term extension cannot change the incentives of creators in existing works, since those works were already fixed at the time of the extension. But changes in rules and regulations happen all the time, and businesses routinely consider the risk of future changes in rules and regulations when making decisions regarding production, technology, and investments. Did creators anticipate the possibility of future upward or downward changes in copyright term at the time of creating their works, given the history of changes in copyright terms over time? I would say most probably yes, implicitly if not explicitly. They could not know for sure if and when such copyright term and other relevant changes would occur, but there is no reason to exclude such considerations.

Economists refer to a loss of potential value as deadweight loss. A deadweight loss arises when pricing (royalty payments) is set above the marginal cost of use, and the marginal value to the user of unused additional units is lower than the price but above the marginal cost.[34] Opponents of term extension argue that it raises the present value of the additional deadweight loss by a small amount for new works but by a much larger amount for existing works. However, deadweight loss is part of an efficient second-best or revenue-constrained solution; in other

[34] To the extent that the pricing is set above the marginal cost of use during the term of copyright, the marginal or last unit used generates a positive net social value.

words, it is an efficient solution under the constraint of properly compensating creators through copyright royalties.

Besides the two misleading beliefs just discussed—that term extensions generate no additional incentive for creativity and imply less creative material entering the public domain—two other misleading claims are that term extensions mean additional costs to consumers in royalty payments[35] and send royalty payments out of the country.

The fact that positive prices "hurt" the buying consumers is not by itself a reason for requiring zero prices. For information assets, positive prices are essential to achieve a second-best efficient allocation of resources to creative activities and industries, even if the marginal costs of use are zero. Claiming that term extension means additional costs for end consumers is an irrelevant truism. The claim ignores also the free-rider problem, which arises when a user prefers accessing zero-cost public domain works over fostering the costly development of new works and creativity. Such free-riding by record labels exploiting the public domain thereby reduces creativity.[36]

The fourth claim, that term extensions will send royalty payments out of the country, is even more fatally flawed, because it sidelines the main issue of creators' fair and equitable compensation and relies on a serious misunderstanding of international trade.[37] Clearly, more

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[35] This claim is reminiscent of the dissenting comment by Justice Breyer in *Eldred* that the term extension of copyright means higher prices and search costs for consumers that are "especially serious here": *Eldred v Ashcroft*, *supra* note 25 at 248.

[36] The *Stargrove Entertainment* case, *supra* note 27, neatly illustrates the reality of this free-rider problem.

[37] See George Barker, "Debunking Common Myths About the Economic Effect of Copyright Term Extensions for Sound Recordings" (29 April 2015), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600769>; and Hugh Stephens, "The New NAFTA (USCMA/CUSMA) and Copyright Term Extension in Canada: How and

royalties will be paid by Canadians to foreign rights holders, but more royalties will also be paid by Canadians and foreigners to compensate Canadian creators as well as to help creation support companies to invest more in arts and culture. Moreover, when considering the copyright payment deficit, if any, that is incurred by a specific country, one should not ignore or forget the major value or utility (consumer surplus) that domestic consumers derive from accessing foreign books, works, and sound recordings.

A statement to the effect that copyright term extension will generate net copyright royalties that will leave the country and therefore profit mainly foreigners may be true or false but in any case cannot be an argument against implementing a term extension, because an international payment deficit for any other good or service cannot justify curtailing the trade in that good or service. The argument originates from a serious misunderstanding of international trade and is a superficial and false argument for the following reasons. The international trade data for any country always show some sectors or some goods and services with a negative (deficit) balance and others with a positive (surplus) balance. No country has a positive trade balance for all goods and services, nor should a country try to achieve such a state. In other words, the balance of copyright payments cannot be looked at in isolation, because it ignores other goods and services as well as the balance of financial transactions (loans and investments): all international transactions are glued to each other through the exchange rate.[38]

When Will Canada Implement Its Commitment?" (20 January 2020), online: *Hugh Stevens Blog* <https://hughstephensblog.net/2020/01/20/the-new-nafta-uscma-cusma-and-copyright-term-extension-in-canada-how-and-when-will-canada-implement-its-commitment/>.

[38] For a discussion of those issues, see Marcel Boyer, "Free Trade and Economic Policies: A Critique of Empirical Reason (The Working Paper Version)" (November 2020), CIRANO 2020s-56, online (pdf): <http://cirano.qc.ca/files/publications/2020s-56.pdf>.

6.0 A Critical Review of the Reversion and Termination Rights

A film or TV production consists of many components—scripts, costumes, sets, scores, set decorations, etc.—each of which is protected separately by copyright. Where the production is based on an existing book or other literary property, the underlying rights are also protected separately. The producer needs to license or acquire the right to use each of these components to complete the production. Where the author was the first owner of copyright in a component and either assigns or grants an exclusive licence to the producer, the copyright to that component in Canada will revert to the author's estate 25 years after his or her death, regardless of the parties' intentions to the contrary. The *Copyright Act* specifically precludes the parties from contracting around or out of reversion; any attempt by the author to do so is void.[39]

So, from the standpoint of a film or TV producer, there is a distinct risk that, even if it has acquired rights to copyrighted material by legitimate means, and even after it has invested additional resources in a film or TV production using that material, it will lose those rights in Canada automatically, 25 years after the author's death. At that point, its options are rather unattractive: attempt to reacquire the rights from the author's heirs or estate, if they can be located and are willing to negotiate; replace the reverted content with a non-infringing substitute, which is rarely feasible (and always expensive); risk infringing copyright by continuing to

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[39] Unlike the United States, Canada does not recognize the "work made for hire" doctrine, which deems the commissioning party to be the author and first copyright owner in many cases, including where the work was commissioned specifically for inclusion in an audiovisual work. The Canadian "work made in the course of employment" doctrine is much narrower and does nothing to avoid reversion in film or TV unless the author of a work happens to have been an employee of the production company—or, possibly, his or her own loan-out company—in which case the company, not the author, will be the first owner of copyright in the work and reversion will not apply.

exploit the work despite the loss of rights; or forgo any further return on the original investment by ceasing exploitation altogether.

Of course, the problem is not limited to the film and TV industries. Record labels, music publishers, and creative businesses of all kinds determine how much to invest in the creation of new content according to the length of time available to exploit it and the revenue that they expect to earn during that time. Indeed, the revenue generated from the exploitation of existing content is the predominant source of working capital to finance the creation of new material. Simply put, the loss of reliable revenue that occurs when copyright reverts to the estate of a creator means less money available to sign new artists or pay advances to established ones for the exploitation of their proven hits.[40]

Reversion also leads to a deeply counterintuitive market dynamic: the closer a work is to reversion, the less valuable it is in the market. As one witness put it before the Industry committee: "[O]wners will be disinclined to invest resources towards the exploitation of a work which is nearing the reversionary threshold, because they will be uncertain whether an author's heirs will assert a reversionary claim."[41] That means that a rational actor will be less likely to invest in the work of an elderly creator, since the exploitation window will be constrained artificially by the risk of reversion. It also leaves the creator's heirs unable to capitalize on the resurgence of public interest that often follows the death of a popular artist—precisely the opposite of what a post-mortem copyright term is intended to achieve. By the time it is once

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[40] Bob Tarantino, brief submitted to the Industry committee, 13 June 2018, in the Industry committee report, *supra* note 3 at 37.

[41] *Ibid*.

again "safe" for creative businesses to invest in the work, its commercial value may be greatly diminished.

There would be an even greater risk if Canada were to introduce termination rights, whether instead of or in addition to reversion. Creative businesses would be faced with an even more imminent prospect of losing key underlying rights, and the risk would be increased by the publicity that would no doubt accompany the introduction of these new rights.

In purely economic terms, the significant uncertainty that exists regarding the future market value of copyrighted works and sound recordings must be and is generally considered when a contract is signed between a creator and a creative business. The total present value (royalties) of a creator's creations, to be shared between the creator and other stakeholders, including creative businesses and their financial investors, is the expected development over time of the future market value (royalties) of those creations over the contract period actualized in today's dollars, as in any other business, at a proper risk-adjusted discount rate.

The calculus is simple: the higher the expected future value of the creations, the longer the contract period, the lower the risk in future royalties, and the larger the present value to be shared.

There is no magical thinking here: the only way to increase the present value of copyright royalties is to increase the quantity and quality of creations as perceived by the market (end consumers), to increase the length of the contract period over which the discounted value is calculated, and to reduce the risk of future royalties. Reducing the risk can be done, for instance, through a better diversification of royalty sources (a pooling of risks among creators under a given creative business) and a more predictable evolution of the contract through better designed, more transparent, and more intensive incentives rules under which the contract is managed and

may be terminated. As a matter of economic theory, those three factors boil down to a present value to be shared in the most effective and efficient way in the creator's interest, including both compensation upfront and over time, as well as investment in proper management and marketing of the creator's creations.

Evaluating investments, in particular investment in creations, is a complex undertaking. Numerous errors must be avoided. Simple and straightforward discounting is not the proper way to proceed. When a creative business invests in a portfolio of creators or works, it is likely that most of them will end up as money-losing ventures. The distribution of success is very asymmetric, with many failures and few successes. Hence, the profitability of a creative business and its capacity to support the development and promotion of creators rely on the small number of highly successful creators that can only be identified *ex post*. If termination and reversion end up skimming the cream of works in distribution, it is clear that creators as a whole will be the main losers of those changes.

A more cumbersome set of copyright rules, higher transaction costs, and riskier termination or reversion rules would tend to depress the value of copyrighted works in the eyes of users, and hence the value to creative businesses, and thus reduce the discounted present value of copyrighted works and the upfront compensation of creators. Changes that would increase uncertainty in the exploitation of works, both on their own and as embedded in adaptations or other derived works, would also tend to reduce the upfront compensation of creators.

As shown above, two particularly prevalent misconceptions about the effects of term extension, reversion rights, and termination rights are the so-called reduced availability of works and the lack of growth of the public domain. This argument seems to concern books rather than music.

Heald[42] discusses the impact on the book industry of the US termination of rights and reversion of rights. Under 17 USC § 203, transfers of copyrights in works published after January 1, 1978 can be terminated 35 years after the transfer, either by the author or his or her heirs. Under 17 USC § 304, transfers of copyrights of books published between January 1, 1950 and January 1, 1978 may be terminated 56 years after publication, or 75 years after publication if the opportunity at year 56 went unexploited. Heald provides the following summary of his work: "This study compares the availability of books whose copyrights are eligible for statutory reversion under US law with books whose copyrights are still exercised by the original publisher. It finds that 17 USC § 203, which permits reversion to authors in year 35 after publication, and 17 USC § 304, which permits reversion 56 years after publication, significantly increase in-print status for important classes of books. … The estimated positive effect of reversion on the availability (in-print status) of titles in the full sample of 1909 books is 20–23%."[43]

Heald also discusses the rationale behind the reversion of rights. A first set of reasons he offers revolves around the paternalistic protection of creators, with legislators worried about creators who may have made bad deals with their publishers, or concerned about heirs who might not be adequately benefiting from their parents' or grandparents' labour.

We saw these reasons from proponents of modified reversion rights and the introduction of termination rights. However, they are not particularly convincing because any future changes in

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[42] Paul J Heald, "Copyright Reversion to Authors (and the *Rosetta* Effect): An Empirical Study of Reappearing Books" (2018), 66 J Copyright Soc 59, online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920> [cited to SSRN].

[43] *Ibid* at 1.

copyright rules, including reversion or termination of rights, will be discounted to the present and lead to a smaller value of payments to be transferred upfront or over time to authors and creators.

Of course, *ex post*, when the future has become the present, some books and works will have maintained their value or acquired a value different from the one expected at the beginning. Creative businesses make deals with creators based on a distribution of future values of creations. Nothing in the *Copyright Act* prevents contracts from taking different forms, some being struck on the basis of discounted expected future values (expected contracts) and others being struck on the basis of conditional future values (conditional contracts) as they become known over time. In the end, for the first type of contracts, some deals will have paid creators much more than the observed or realized value of their works, and others will have paid much less. For the second type of contracts, some creators will end up in less favourable conditions than they would have under the first set of contracts.

As in insurance markets, the risk aversion of creators will affect their choice of contracts: the less risk-averse will choose the conditional contracts and the more risk-averse the expected contracts. There is no “one size fits all” here, and the *Copyright Act* does not prevent contracts from taking different forms. It is better to leave the decision to those directly concerned—creators and the creative businesses that support them.

However, better informed artists and creative businesses would make the bargaining power more balanced. Both partners would benefit from a better understanding of different forms of expected versus conditional contracts. Creators’ guilds or unions have an important role to play here, as does the Competition Bureau, which should make sure that competition prevails in the creative business sector. It is neither necessary nor beneficial that such contractual terms be directly fixed by law or regulations.

A second set of reasons identified by Heald for the reversion of rights offers a different view: after a certain period, creators may do a better job than creative businesses of making works available to the public or of creating new derivative works. Why? This second set of reasons is not convincing either, because the marginal costs involved in exploiting small market opportunities are much lower for large publishers, for example, than for authors and small publishers. Why would larger publishers leave easy money on the table? Of course, that does not mean that "errors" cannot be made. For a convincing analysis, however, one would need to evaluate decisions on books in print, since some of those may turn out to be failures. Larger publishers may keep in-print books that should have been dropped and keep out-of-print books that should have been reprinted, and the same is probably true for smaller publishers.

In other words, Heald looks only at one tail of the distribution, that is, books that are out of print and that are reprinted when they fall into the public domain. But to provide a balanced picture of publishers' decisions, it is necessary to consider those books in print that should have been out of print on the basis of their diminished popularity. It is quite likely that the two tails of the distribution are cancelling out.

For these reasons—even beyond the inherent limitation of his analysis, which is confined to books and does not consider music, films, and so on—Heald's results are simply not convincing. Heald offers the following final comment: "This study suggests, however, that shifting the ownership of a copyright from the initial transferee/publisher may, *under the proper circumstances*, result in the republication of out-of-print books."[44] It appears that this result is mainly due to the *Rosetta* effect, as confirmed by Heald himself: "The 2002 decision in *Random*

[44] *Ibid* at 47 [emphasis added].

House v. Rosetta Books, which worked a one-time *de facto* reversion of ebook rights to authors, has an even greater effect on in-print status than the statutory schemes."[45]

Rosetta may not bite in the future, since publishers can be expected to negotiate renewed contracts with authors to redefine rights in all print and digital versions of books. On the other hand, the threat of reversion and the uncertainty it creates may, like *Rosetta*, have a negative effect on availability, causing some books to go out of print. Heald suggests that more comparative studies are necessary to confirm his early results on the US experience.

I should add that given the complexity of the copyright microcosm and ecosystem, and given in particular the character of literary and musical works as information goods, taking a pro-creator stand and willing to help creators financially and otherwise cannot be made concrete without a fine understanding of the roots of the problem.

Taking the easy but ineffective step of intervening, through reversion and termination, in the contractual relationship between creators and their main partners, creative businesses as publishers and record labels, is not the solution. To the contrary, it is likely to generate more harm than good.

7.0 The Challenge of Registration

In his analysis of the *Eldred* case, Rimmer recalls that Lawrence Lessig, the main lawyer for the petitioner (Eldred) in the case, put forward a fallback fee-based registration position in 2001.[46]

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[45] *Ibid* at 1, citing *Random House, Inc v Rosetta Books, Inc*, 283 F 3d 490 (2d Cir 2002).

[46] Rimmer, *supra* note 26, commenting on Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001). See also Lawrence Lessig, "Protecting Mickey Mouse at Art's Expense," *New York Times* (18 January 2003).

Unless copyright is registered and a fee is paid every few years, the work would fall in the public domain.[47] Rimmer argues that this "law and economics model of indefinite, renewable protection would be diabolical in practice," because turning copyright into a registration system would require a large bureaucratic registry, with the risk of seeing artists and creators "disenfranchised if they could not afford registration fees." He claims that "the trend in international copyright law is towards the removal of formalities in copyright law."[48]

Besides the arguments put forth by Rimmer, the strongest economic argument against registration is that it significantly raises transaction costs and introduces considerable uncertainty in the system. In the face of that criticism, Lessig and others have sometimes proposed only a nominal renewal fee. Still, from an economic perspective, it appears that a registration-based system—especially one that requires mandatory renewal by heirs or successors, who, unlike the creators, may not be steeped in the creative ecosystem and therefore may be unaware of their legal obligations—would be little more than a trap for the unwary. Unless some reasonable arguments, studies, and measures can be provided to show that the actual system of copyright ownership is seriously broken, even despite the existence of well-functioning collective societies whose entire raison d'être is to facilitate efficient licensing and payment to rights holders, it is better not to fix it.

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[47] See also Richard A Posner, "The Law and Economics of Intellectual Property" (2002) 131:2 Daedalus 5; and Richard A Posner & William M Landes, "Indefinitely Renewable Copyright" (2003) 70:2 U Chicago L Rev 471. They conclude that "a system of indefinite copyright renewals need not starve the public domain" (*ibid* at 475).

[48] Rimmer, *supra* note 46.

The main reason advocated by the Industry committee for such a cumbersome registration system is to mitigate the negative effects of term extension. It looks very much like a cure worse than the disease.

8.0 Conclusion

Term extension is fully compatible with economic efficiency principles regarding the allocation of resources to the production and dissemination of information goods as well as incentives for creativity. Copyright term extension will favour the increase in the supply of new creation goods.

The most important and pressing copyright agenda today centres on two challenging tasks: the discovery of the competitive market value (or at least the fair and equitable value) of copyrighted works, and the identification of sources of compensation to cover that value. If the Industry and Heritage committees wanted to increase compensation to creators, they should have proposed amendments to the *Copyright Act* that would raise the revenues of all rights holders and their partners toward their competitive levels. Instead, they focused their attention on the sharing of the pie, proposing to play Robin Hood by taking from creative businesses with the apparent intention of giving more to creators. In practice, however, the measures proposed are likely to reduce not only compensation to creators but also investments by creative businesses in other works. In order to increase compensation to creators, the urgent and more important task is to increase significantly the size of the pie itself so that it reaches its competitive market value level.

Maintaining the reversion right and introducing a new termination right would affect the sharing of royalties between different stakeholders and partners in creative activities and products. Similarly, the introduction of a mandatory registration requirement would introduce significant

uncertainty into the management and marketing of creative activities. As a result, their most probable effect would be to reduce the size of the royalty pie (the future expected royalty payments discounted at a risk-adjusted rate), not to increase compensation to creators or promote the public interest in creation and dissemination. In the end, these amendments would likely generate more harm than good to the creators they were intended to support.